

1-1-1967

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B. R. Bugelski
University at Buffalo

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Recommended Citation

B. R. Bugelski, *Changing Values in Criminal Law—Comments on Professor Hall's Paper*, 16 Buff. L. Rev. 360 (1967).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol16/iss2/3>

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CHANGING VALUES IN CRIMINAL LAW—COMMENTS ON PROFESSOR HALL'S PAPER

B. R. BUGELSKI*

DR. Hall is concerned over the erosion of criminal law because of the development of views and practices in society on behalf of defendants that editors sometimes describe in the statement "make everyone guilty except the criminal." He wants to preserve the law which he perceives as a time honored value of a rational society from further erosion. He does admit some irrational elements in the law, but finds it basically a logical product of centuries of thought and experience. He sees eroding operations on many sides and mentions, among others, the adjustments the law has made for the insane (temporary or otherwise), the alcoholic, the mistaken, the coerced, the tired, confused, and the young. There are also the common practices of probation, suspended sentence, waivers of felony charges, "the copping of pleas," paroles, etc.

I am not so sure that the law described by Professor Hall as "the precise definition of criminal conduct, prescription of the maximum sentence, and, of course, the ban on retroactivity,"¹ is a value of our culture. The current values of society seem to have changed into a concern over civil rights, including those of criminals, rather than a concern over guilt and punishment. Alleged criminals are frequently discharged by the courts because of the illegal manner in which the evidence against them was obtained, and not because of a finding of innocence. There has also come into the picture a disillusionment over the role of punishment. We no longer seek revenge, yet prisons are not really expected to reform felons. The law is perhaps more correctly seen as an expression of the culture, a set of protective devices for the dominant segment of society and frequently for the benefit of certain individuals in the culture who manage to get laws enacted for their own benefit, while they violate sanctions developed to protect the interests of others. Some of the pillars of our society cheat on their income tax returns. The law is a reflection of current interpretations of the nature of man. It changes as the views of society about the nature of man change. The law is not an unchanging reality in itself, although we might agree that the "principle of law" might be. How the principle is implemented would vary from time to time, and with different segments of society. In any event, the law is not a sufficiently serious value for those who violate it, and it is with these violators, the criminals, that we are concerned.

Dr. Hall indicated that he was not inclined to endorse a deterministic principle in his approach to criminology. This is unpleasant, ignoble, and incongruous to him, and he would prefer people to be rational and somehow

* Professor of Psychology; Chairman, Dep't of Psychology, State University of New York at Buffalo.

1. Hall, *Psychiatric Criminology: Is it a Valid Marriage? The Legal View*, *supra* p. 350.

look for better solutions than their pasts would predict. I rather doubt that anyone is really capable of finding a better solution to his problems than his history provides, even though we may not be at the stage of development of behavioral science to make these predictions for the problem solver. I also doubt that the question of determinism can be resolved here, and am glad to by-pass it in favor of some other comments. We should note, however, that strong social pressures, including those arising from Freudian views, are currently active to relieve everyone of responsibility. Today the criminal is generally viewed as someone who could not help himself, a victim of unconscious forces, faulty rearing, the bad environment, the broken home, the working mother, etc.

But let us forget "unconscious forces" and accept the fact that a criminal, say a purse-snatcher, "knows" what he is doing, namely, snatching purses. The law (*i.e.*, courts, juries, prosecutors) also wants him to recognize (appreciate, know) that this is *wrong*. He may well know that it is illegal—that is, that some other people have passed laws saying that purse-snatching is bad, evil, sinful, etc.—but it is obvious that the purse-snatcher does not agree. For him it may be "dangerous" but it is not necessarily wrong. It may even be right and good, especially if the purse is fat. What I am describing is a case of dissocial reaction or of a sociopath, a member of a class psychiatrists once called psychopaths. Such individuals are "outlaws" and live in their own culture, with their own rules and laws; they are enemies of the dominant culture which passed the rules that are in conflict with their own. Our national crime syndicates have their own legal system.

How does the law treat the sociopath? Does it consider the rationality of the behavior from the criminal's viewpoint? If he is young and from a slum, or a drug addict, there may be some talk of "another chance," "faulty environment," need for reform, rehabilitation (note the absurdity of rehabilitating someone who has never been habilitated). Too great a concern over the rationality of the criminal might require social reforms that are not too attractive for the defenders of the status quo. If the criminal is old, a member of a crime syndicate, a two- or three-time loser, he is jailed when caught and the law closes its weary eyes to his rationality. The law does not want to hear Valachi's logical reasons. The rational law, the law of sensible men (that is, the law-makers), then does not apply to sociopaths—they know what they are doing, they know that it is considered wrong by someone else (they make every effort to conceal their crimes or escape capture), but they do not consider their behavior at all irrational or wrong. Nor are they driven by forces any more unconscious than those that drive the lawmakers. For the purse-snatcher the logical thing to do when you need money is to snatch a purse. Criminal law presupposes that the criminal agrees to the wrongfulness of an act, whereas he obviously does not. He does not "know better" and, according to a rationally based law, he should not be punished. He should be taught to really appreciate the values of a society to which he does not really belong. Punitive sanctions

are not appropriate. They are used to get rid of a problem. Sociopathic criminals are not punished so much as "caged." Punishment is not expected to change them. They are locked up and given television sets. Valachi has one!

Besides the sociopaths we have the neurotics and psychotics. Some psychotics are brain-damaged, or otherwise physically diseased, and their crimes are clearly excusable. Others have lost touch with reality (not in the interpretation of Dr. Hall—some of their intellectual functions might be quite adequate); the textbook paranoid can plan an involved scheme to destroy a family or a church congregation—he just doesn't *realize his own nature* or status. If he thinks he is an avenging angel he is out of touch with reality even though his IQ is 150. He too will be excused; this time by psychiatrists. In fact, the more people he murders the more likely he is to escape legal sanctions. Even the public will say "only an insane monster could perform such foul deeds." Dr. Hall assumes that the capacity to think rationally and effectively is somehow "integrated" with the rest of an individual's personality or behavior. This does not mean, as Dr. Hall apparently takes it, that an intelligent person cannot be psychotic. There is probably normal range of intelligence in state hospitals for the insane. They may be psychotic but not necessarily ignorant. Such integration as exists could incorporate anti-social motives, as well as noble ones.

The neurotics provide the most difficult cases. The psychiatrists try to show how they are victims of their anxieties and defenses. It is frequently said that they are "sick," although some maverick psychiatrists like Szasz call this sickness a myth. Here the law has its greatest problems. You should not punish the sick, even if their sickness is not such as responds to pills, or can be described in terms of fevers, chills, rashes, and aches or pains. Dr. Szasz argues that they must be treated as criminals if they break laws. Psychiatrists should not attempt to plead their cases lest the dispensation of justice fall into the hands of psychiatrists and not of lawyers. Recently a local judge indicated that he would like a psychiatric judgment before a trial. The psychiatrists would then determine if a trial was in order. This is complete capitulation of the judicial function to what even the practitioners admit is a shaky science.

But Professor Mowrer,² a psychologist of Illinois, argues paradoxically that neurotics are really criminals, sinners, doers of wrongs, who need punishment as therapy. To free them in courts of justice is to condemn them to an unrelieved pursuit of their neurotic patterns. According to Mowrer, the only cure for neurotics is confession, restitution, and punishment. The neurotic is the only appropriate person to bring before the bench. He has some conscience, *i.e.*, recognition of the dominant mores (not enough to keep him from a crime or crimes, but enough so that he is disturbed when he violates the ethical-moral-legal code of the dominant culture of which he is a somewhat unintegrated member). Because he has some conscience he suffers in neurotic malaise. He cannot help what he did—the irresistible impulse is a correct enough label for

2. Mowrer, *The New Group Therapy* (1964).

any crime committed (if it is committed it certainly wasn't resisted). Yet, for his own good, he should not be excused. He should be tried and punished according to a law he grudgingly respects. No paroles, suspended sentences, or reductions of pleas; these will not help him, but only perpetuate his condition.

We come then to the conclusion if we go along with Mowrer, that the law is required to treat neurotics. Normal people, by definition, do not commit crimes. Professor Hall stated: "given normal intelligence, there will be normal control of conduct."³ The law-making public wants protection against crime, yet psychotics and sociopaths are not to be punished by a rational legal system, they must be cured or reformed or reeducated, except that we do not have the facilities, manpower, or skills to do the job. The only criminals for whom the rational law is needed are irrational neurotics. They know right from wrong, but could not help what they did; yet, even so, they need trials, convictions, and punishment, not to satisfy the law, but to cure their neuroses. The law must be maintained for the good of neurotics, not because it is a rational value to man.

3. Hall, *supra* note 1, at 356.